O.J.A. MONTHLY REVIEW OF CASES

ON

CIVIL, CRIMINAL & OTHER LAWS, 2015

(*AUGUST*)

Odisha Judicial Academy, Cuttack, Odisha

ODISHA JUDICIAL ACADEMY
MONTHLY REVIEW OF CASES ON CIVIL, CRIMINAL & OTHER LAWS, 2015 (AUGUST)
I N D E X

* * * * * * *

2. Section 96 (2)
Order 9 Rule 13, Order 43 Rule 1,
Ajit Singh @ Arit Singh Chhabra Vs. Anil Kumar Mishra.
DR. A.K.RATH, J.
IN The HIGH COURT OF ORISSA, CUTTACK
Date of Judgment: 12.08.2015
Issue

The Conflict and application on ex-parte decree and order.

Relevant Extract

Opposite party as plaintiff filed a suit for realisation of arrear dues along with pendente lite and future interest at the rate of 12% per annum from the defendant in the court of learned Civil Judge (Junior Division), Jharsuguda, which was registered as Money Suit No.2 of 2002. The suit was decreed ex parte on 4.3.2003. Against the said judgment and decree, the petitioner-defendant filed an appeal before the learned Addl. District Judge, Jharsuguda, which was registered as RFA No.7 of 2003. By judgment dated 29.1.2005, the learned Addl. District Judge dismissed the appeal holding, inter alia, that the appellant-petitioner should have first approached the learned lower court under Order IX Rule 13 Civil Procedure Code (hereinafter referred to as "the CPC") and, therefore, the appeal is not maintainable.

Heard Mr. Manoranjan Dash, learned counsel for the petitioner and Mr. Saroj Kumar Dash, learned counsel for the opposite party. The sole question that hinges for consideration in this petition is: what is the remedy available to the defendant when the suit is decreed ex parte?

The subject-matter of dispute is no more res integra. In Arjun Singh v. Mohindra Kumar and others, AIR 1964 SC 993, the apex Court held that when a suit is decree ex parte, Order IX Rule 13 CPC would come in. The defendant can, besides filing an appeal or an application for review, have recourse to an application under Order IX Rule 13 to set aside the ex parte decree. Elucidating further, the apex Court in the case of Bhanu Kumar Jain v. Archana Kumar and another, AIR 2005 SC 626, in paragraphs-26, 36, 37 and 38 of the report, held as follows:

When an ex parte decree is passed, the defendant (apart from filing a review petition and a suit for setting aside the ex parte decree on the ground of fraud) has two clear options, one, to file an appeal and another to file an

application for setting aside the order in terms of Order 9, Rule 13 of the Code. He can take recourse to both the proceedings simultaneously but in the event the appeal is dismissed as a result whereof the ex parte decree passed by the Trial Court merges with the order passed by the appellate court, having regard to Explanation appended to Order 9, Rule 13 of the Code a petition under Order 9, Rule 13 would not be maintainable. However, the Explanation I appended to said provision does not suggest that the converse is also true.

xxx xxx xxx

A right to question the correctness of the decree in a First Appeal is a statutory right. Such a right shall not be curtailed nor any embargo thereupon shall be fixed unless the statute expressly or by necessary implication say so. [See Deepal Girishbhai Soni Vs. United India Insurance Co. Ltd. (2004) 5 SCC 385 and Chandravathi P.K. and Others Vs. C.K. Saji and Others, (2004) 3 SCC 734].

We have, however, no doubt in our mind that when an application under Order 9, Rule 13 of the Code is dismissed, the defendant can only avail a remedy available there against, viz, to prefer an appeal in terms of Order 43, Rule 1 of the Code. Once such an appeal is dismissed, the Appellant cannot raise the same contention in the First Appeal. If it be held that such a contention can be raised both in the First Appeal as also in the proceedings arising from an application under Order 9, Rule 13, it may lead to conflict of decisions which is not contemplated in law.

The dichotomy, in our opinion, can be resolved by holding that whereas the defendant would not be permitted to raise a contention as regards the correctness or otherwise of the order posting the suit for ex parte hearing by the Trial Court and/or existence of a sufficient case for non- appearance of the defendant before it, it would be open to him to argue in the First Appeal filed by him against Section 96(2) of the Code on the merit of the suit so as to enable him to contend that the materials brought on record by the plaintiffs were not sufficient for passing a decree in his favour or the suit was otherwise not maintainable. Lack of jurisdiction of the court can also be a possible plea in such an appeal. We, however, agree with Mr. Choudhari that the 'Explanation' appended to Order 9 Rule 13 of the Code shall receive a strict construction as was held by this court in Rani Choudhury (supra), P. Kiran Kumar (supra) and Shyam Sundar Sarma Vs. Pannalal Jaiswal and Others [2004 (9) SCALE 270]."

The logical sequitur of the analysis made in the preceding paragraphs is that defendant, against whom an ex parte decree is passed, has the following remedies available to him;

I. file an application under Order IX Rule 13 CPC to set aside the ex parte decree; or

II. Prefer an appeal against such decree under Section 96(2) CPC ; or

III. File an application for review under Order 47 Rule 1 of the CPC; or

IV. Institute a suit on the ground of fraud.

An application under Order IX Rule 13 CPC is a statutory remedy. Equally, right to file an appeal under Section 96(2) CPC is a statutory in nature. Such a right shall not be curtailed, nor any embargo thereupon shall be fixed unless the statute expressly or by necessary implication say so.

Thus the learned lower appellate court has committed a patent error in law in holding that the appeal is not maintainable. True it is, instead of quoting Section 96 CPC, the petitioner has wrongly quoted Order 43 Rule 1 CPC in the cause title of the appeal memo, but the appeal in essence is an appeal under Section 96 CPC. Law is well settled that if a court has power, only by use of a wrong nomenclature in the petition, such power cannot be taken away (Bhabatosh Sinha v. Prara Sinha & others, AIR 2006 Orissa 7). The duty of the Court is to impart justice. The substance of the petition matters, not nomenclature. The Court cannot pull down its shutters on trivial grounds.

On taking a holistic view of the matter, this Court has no hesitation to quash the judgment dated 29.1.2005 passed by the learned Addl. District Judge, Jharsuguda in RFA No.7 of 2003, vide Annexure-2, and remit the matter back to the learned lower appellate court for hearing the appeal on merit. Learned lower appellate court is directed to conclude the hearing of the appeal within a period of six months from today. The petition is allowed. No costs.

*****

3. Order 26 Rule 10 –A Civil Procedure Code
Article 226 & 227
Sibaram Subudhi Vs. Padmabati Patra.
A. K. Rath, J.
IN THE HIGH COURT OF ORISSA, CUTTACK
Date of Judgment: 05.08.2015
Issue

Issue of Commission and Power of superintendence by High Court – Decided.

Relevant Extract

Aggrieved by and dissatisfied with the order dated 31.3.2004 passed by the learned Ad hoc Addl. District Judge, Khurda in C.S. No.47/67 of 2003, the petitioner has filed the instant petition. By the said order, the learned trial court has sent the document, said to have been executed by the defendant for alienation of the suit land in favour of the plaintiff, to the handwriting expert for examination.

Opposite party as plaintiff laid a suit for specific performance of agreement in the court of learned Civil Judge (Senior Division), Khurda, which was registered as C.S. No.47 of 2003. The same was subsequently transferred to the court of learned Ad hoc Addl. District Judge, Khurda and re-numbered as C.S. No.47/67 of 2003. The case of the opposite party-plaintiff is that the petitioner-defendant is the owner of the suit schedule property. The defendant had taken a sum of Rs.25,000/- from the plaintiff on 30.3.2000. Thereafter, he had taken Rs.75,000/- on different occasions. Thus a sum of Rs.1,00,000/- had been taken by the defendant. On 10.4.2000, the defendant expressed his inability to repay the loan and agreed to sell the suit schedule property and suggested the plaintiff to purchase the same. The plaintiff agreed to the proposal. The consideration amount was settled at Rs.2,00,000/-. It was settled between the parties that the defendant will execute the registered sale deed after receipt of the balance consideration amount and thereafter he will deliver the possession. He executed the plain paper agreement. It is further stated that the plaintiff on several occasions offered the balance amount to the defendant and requested him to execute the sale deed, but the defendant did not execute the sale deed. On 17.3.2003 the plaintiff had sent a lawyer's notice to the defendant.

Pursuant to issuance of notice, the defendant has filed the written statement contending, inter alia, that the suit is hit under the provision of the Orissa Money-lenders' Act, 1939. The suit schedule land along with building is

his only residential house. He has never received a sum of Rs.1,00,000/- from the plaintiff nor executed the agreement.

While the matter stood thus, the plaintiff filed an application under Section 45 of the Indian Evidence Act to send the agreement said to have been executed by the defendant to the handwriting expert. The defendant objected to the same on the ground that the document is in sealed cover and has not seen the light of the day and, as such, there is no need to send the same to the handwriting expert.

By order dated 31.3.2004, the learned trial court came to hold that the defendant has categorically stated in the written statement that neither he had taken any loan from the plaintiff, nor executed any document to alienate the suit schedule land. Thus the execution of the document has been denied by the defendant. Under such circumstances, it is not possible on the part of the plaintiff to prove the signature appearing in the document by oral evidence. Having held so, the learned trial court allowed the prayer and directed the plaintiff to deposit a sum of Rs.1500/- for examination of the document by an expert.

Before delving deep into the matter, it is pertinent to mention here the nature of this proceeding : Whether the instant petition is filed under Article 226 or Article 227 of the Constitution of India ?

This is not a virgin ground in so far as the question is concerned. The same has been set at rest by the apex Court in the case of Radhey Shyam and another v. Chhabi Nath and others, (2015) 5 SCC 423. In Radhey Shyam (supra) the question arose before the apex Court, as to whether the law laid down in Surya Dev Rai v. Ram Chander Rai, (2003) 6 SCC 675 that judicial orders passed by the civil court can be examined and then corrected/reversed by the writ court under Article 226 of the Constitution in exercise of its power under writ of certiorari. The apex Court in paragraph-27 of the report came to hold that the judicial orders of the civil courts are not amenable to a writ of certiorari. It was further held that the scope of Article 227 is different from Article 226.

From the aforesaid pronouncement, it is crystal clear that an order passed by a civil court can only be assailed under Article 227 of the Constitution of India. The said view has been affirmed in Sh Jogendrasinhji Vijaysinghji v. State of Gujarat & others, Civil Appeal No.2374 of 2015 disposed of on 6.7.2015.

The parameters of challenge have been laid down by the apex Court in catena of decisions. Under Article 227 of the Constitution, the High Court has the power of superintendence over all Courts and Tribunals throughout the territory in relation to which it exercises jurisdiction. The power to issue writs is not the same as the power of superintendence. The power of superintendence conferred upon every High Court by Article 227 is a supervisory jurisdiction intended to ensure that subordinate Courts and Tribunals act within the limits of their authority and according to law. Under Article 227 what comes up before the High Court is the order or judgment of a subordinate court or tribunal for the purpose of ascertaining whether in giving such judgment or order that subordinate court or tribunal has acted within its authority and according to law. The proceeding under Article 227 is not an original proceeding as held by the apex Court in the case of Umaji Keshao Meshram and others v. Smt. Radhikabai and another, AIR 1986 SC 1272.

The power under Article 227 of the Constitution is intended to be used sparingly and only in appropriate cases in order to keep the subordinate Courts and Tribunals within the bounds of their authority and not for correcting mere errors as held by the apex Court in the case of Waryam Singh and another v. Amarnath and another, AIR 1954 SC 215.

Section 75 of the Civil Procedure Code (hereinafter referred to as "the CPC") defines the power of Court to issue commissions. The said section was amended by Act 104 of 1976. Clauses (e) to (g) were inserted by the aforesaid amendment. The detail provisions of commissions have been set out in Order 26 of the CPC. As a consequence of the amendment made in the CPC, new Rules 10-A to 10-C have been inserted under Order 26 of the CPC. The power of the court to issue commission has been widened by virtue of the amendment made in Section 75 of the CPC. Clause (e) of Section 75 of the CPC empowers the Court to issue commissions to hold a scientific, technical, or expert investigation when it is needed for determination of any issue before the court. Order 26 Rule 10-A of the CPC provides that where any question

arising in a suit involves any scientific investigation which cannot, in the opinion of the Court, be conveniently conducted before the Court, the Court may, if it is necessary or expedient in the interest of justice so to do, issue a commission to such person as it thinks fit, directing him to enquire into such question and report thereon to the Court.

A Division Bench of this Court, in the case of Natabar Behera v. Batakrishna Das 62 (1986) CLT 613 came to hold that scientific examination means ascertainment by observation and experiment critically tested, systematized and brought under a set of principles. Comparison of a disputed signature with the admitted ones involves specialized skill based on study. It, therefore, comes within the scientific investigation and cannot be done by a lay man without having the scientific knowledge and specialization on the subject. The handwriting experts for the purposes of comparison of the handwritings take enlarged photographs of the disputed and the admitted writings and examine the same by application of recognized principles and by critical tests which in most cases cannot be conveniently conducted before the court. In the said case, the genuineness of the signatures in the agreement having been disputed, the learned trial court issued a commission for investigation by an expert. The said order was affirmed in the aforesaid case.

Considering the case on the anvil of the decisions cited supra it is seen that the stand of the plaintiff that the defendant had executed an agreement and received a part of the consideration amount to sell the suit schedule property has been specifically denied. Thus the genuineness of the signature appearing in the agreement having been disputed, the learned trial court has rightly issued a commission for investigation by an expert.

The petition, sans any merit, is accordingly dismissed.

*****

4. Section 319 & 227
JOGENDRA YADAV & ORS. Vs. STATE OF BIHAR & ANR.
S.A. BOBDE & R.K. AGRAWAL, JJ.
IN THE SUPREME COURT OF INDIA
Date of Judgment: 15-07-2015
Issue

Interpretation of adding accused u/s 319 wheather can be discharged u/s 227 of Cr.P.C.

Relevant Extract

This is an appeal by four persons who have been added as accused under Section 319 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') in Sessions Trial No.446/2002 for an offence under Section 302 read with Sections 149 and 323 of the Indian Penal Code, 1860 (for short 'the IPC') and Section 27 of the Arms Act, 1959. The trial is being held in respect of the murder of one Saryug Yadav. On 04.06.2000, FIR was lodged by an informant under Sections 149, 302 and 323 of the IPC against 8 accused. A charge-sheet was submitted on 23.04.2001 only against four persons. Later on, a supplementary charge-sheet was submitted on 31.01.2003 by which one Bhankhar Yadav was included. A final form was submitted excluding the four appellants herein viz. Jogendra Yadav, Kailash Yadav, Kusum Pahalwan, Brijendra Yadav from the array of parties. On 18.02.2003, the Magistrate accepted the charge-sheet and the final form while taking cognizance of the offence. The case was committed to the Court of Sessions.

In the course of the trial, the evidence of the widow and two sons of the deceased were recorded. On the basis of the evidence the Additional Sessions Judge on 05.02.2005 under Section 319 of the Cr.P.C. issued notice to the appellants asking them to show cause as to why they should not be added as accused. After giving an opportunity to the appellants to file a reply, the learned Additional Sessions Judge summoned the appellants as accused for being added to the proceedings. It is nobody’s case that they were not heard before such summon. In any case after the appellants were added, they preferred an application under Section 482 of the Cr.P.C. before the High Court, which was pending for a long time. They finally withdrew this application since they had got relief by way of discharge under Section 227 of the Cr.P.C. The respondent State preferred a Criminal Revision Application before the High Court. The High Court set aside the Order dated 23.09.2006

in Criminal Revision Application passed by the Additional Sessions Judge by which the appellants were discharged. While setting aside the order, the High Court made several observations on the merits of the case as well as on the material that was taken into account before discharging the appellants – accused. The High Court also observed that the order by which the appellants were added under Section 319 of the Cr.P.C. was not challenged and was allowed to become final. This may not actually be accurate since, as noted above, the appellants had in fact challenged the order but had withdrawn the application under Section 482 of the Cr.P.C.

The High Court also observed that the order of discharge virtually nullifies the order under Section 319 of the Cr.P.C. made earlier by which the accused were added. It is this last observation which has been put in issue before us. Provisions of Sections 227 and 319 of the Cr.P.C. are read as under:

"227. **Discharge.-** If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.

319. **Power to proceed against other persons appearing to be guilty of offence**.-

(1) Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.

(2) Where such person is not attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub- section (1), then-

(a) the proceedings in respect of such person shall be commenced a fresh, and the witnesses re- heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced."

It is apparent that both these provisions, in essence, have the opposite effect. The power under Section 319 of the Cr.P.C. results in the summoning and consequent commencement of the proceedings against a person who was hitherto not an accused and the power under Section 227 of the Cr.P.C., results in termination of proceedings against the person who is an accused.

Thus it does not stand to reason that a person who is summoned as an accused to stand trial and added as such to the proceedings on the basis of a stricter standard of proof can be allowed to be discharged from the proceedings on the basis of a lesser standard of proof such as a prima facie connection with the offence necessary for charging the accused.

We are not unmindful of the fact that the interpretation placed by us on the scheme of Sections 319 and 227 makes Section 227 unavailable to an accused who has been added under Section 319 of the Cr.P.C. We are of the view, for the reasons given above that this must necessarily be so since a view to the contrary would render the exercise undertaken by a Court under Section 319 of the Cr.P.C., for summoning an accused, on the basis of a higher standard of proof totally in fructuous and futile if the same court were to subsequently discharge the same accused by exercise of the power under Section 227 of the Cr.P.C., on the basis of a mere *prima facie* view. The exercise of the power under Section 319 of the Cr.P.C., must be placed on a higher pedestal. Needless to say the accused summoned under Section 319 of the Cr.P.C., are entitled to invoke remedy under law against an illegal or improper exercise of the power under Section 319, but cannot have the effect of the order undone by seeking a discharge under Section 227 of the Cr.P.C. If allowed to, such an action of discharge would not be in accordance with the purpose of the Cr.P.C in enacting Section 319 which empowers the Court to summon a person for being tried along with the other accused where it appears from the evidence that he has committed an offence. Ms. Prerna Singh, learned counsel for the State also submitted that a person who is an accused under Section 319 ought not to be given an opportunity to avail of the remedy of discharge under Section 227 since it would be contrary to the scheme and intent of the Cr.P.C.

We have no difficulty in accepting this submission for the reasons stated above. We are also satisfied that it would not result in any undue hardships to the accused since the remedy before a superior court is available. In the result, we see no merit in the appeal which is liable to be dismissed. The criminal appeal is dismissed in view of the above.

*****

5. Section 482
State Of Kerala And Ors Vs. S. Unnikrishnan Nair and Ors.
Dipak Misra & Prafulla C. Pant, JJ.
IN THE SUPREME COURT OF INDIA
Date of Judgment: 13-08-2015
Issue

Justification in quashing the FIR u/s 482 Cr.P.C. in case of offences u/s 182, 194,195,195 A, and 306 of IPC.

Relevant Extract

The facts in detail need not be stated, for the controversy really lies in a narrow compass. As the factual matrix would unfurl, one Sampath was alleged to have been beaten to death by the investigating agency, that is, the State police, while he was in custody. His brother, Murukeshan, preferred W.P.(C) No.13426 of 2010 and during the pendency of the writ petition, he filed I.A. No.16944 of 2010. His prayer was basically for issuance of a direction to the Director, Central Bureau of Investigation (C.B.I.) to submit a detailed report regarding the investigation so far conducted and production of the entire case diary. As is manifest, he was not satisfied with the investigation conducted by the State police and his prayer was for better and more rigorous investigation. Be it noted, the High Court by an earlier order had directed the C.B.I. to investigate as there were certain allegations against the State police.

To appreciate the rivalised submissions in the obtaining factual matrix, it is necessary to understand the concept of abatement as enshrined in Section 107 IPC. The said provision reads as follows:- "107. A person abets the doing of a thing, who – First – Instigates any person to do that thing; or Secondly – Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or Thirdly – Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1. – A person who, by wilful misrepresentation, or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Explanation 2 – Whoever, either prior to or at the time of commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

As we find from the narration of facts and the material brought on record in the case at hand, it is the suicide note which forms the fulcrum of the allegations and for proper appreciation of the same, we have reproduced it herein-before. On a plain reading of the same, it is difficult to hold that there has been any abetment by the respondents. The note, except saying that the respondents compelled him to do everything and cheated him and put him in deep trouble, contains nothing else. The respondents were inferior in rank and it is surprising that such a thing could happen. That apart, the allegation is really vague. It also baffles reason, for the department had made him the head of the investigating team and the High Court had reposed complete faith in him and granted him the liberty to move the court, in such a situation, there was no warrant to feel cheated and to be put in trouble by the officers belonging to the lower rank. That apart, he has also put the blame on the Chief Judicial Magistrate by stating that he had put pressure on him. He has also made the allegation against the Advocate.

In Netai Dutta case, a two-Judge Bench, while dealing with the concept of abetment under Section 107 I.P.C. and, especially, in the context of suicide note, had to say this:

"In the suicide note, except referring to the name of the appellant at two places, there is no reference of any act or incidence whereby the appellant herein is alleged to have committed any wilful act or omission or intentionally aided or instigated the deceased Pranab Kumar Nag in committing the act of suicide. There is no case that the appellant has played any part or any role in any conspiracy, which ultimately instigated or resulted in the commission of suicide by deceased Pranab Kumar Nag. Apart from the suicide note, there is no allegation made by the complainant that the appellant herein in any way was harassing his brother, Pranab Kumar Nag. The case registered against the appellant is without any factual foundation. The contents of the alleged suicide note do not in any way make out the offence against the appellant. The prosecution initiated against the appellant would only result in sheer harassment to the appellant without any fruitful result. In our opinion, the learned Single Judge seriously erred in holding that the First Information Report against the appellant disclosed the elements of a cognizable offence. There was absolutely no ground to proceed against the appellant herein. We find that this is a fit case where the extraordinary power under Section 482 of the Code of Criminal Procedure is to be invoked. We quash the criminal proceedings initiated against the appellant and accordingly allow the appeal."

In the instant case, alleged harassment had not been a casual feature, rather remained a matter of persistent harassment. It is not a case of a driver; or a man having an illicit relationship with a married woman, knowing that she also had another paramour; and therefore, cannot be compared to the situation of the deceased in the instant case, who was a qualified graduate engineer and still suffered persistent harassment and humiliation and additionally, also had to endure continuous illegal demands made by the appellant, upon non-fulfillment of which, he would be mercilessly harassed by the appellant for a prolonged period of time. He had also been forced to work continuously for a long durations in the factory, vis-à-vis other employees which often even entered to 16-17 hours at a stretch. Such harassment, coupled with the utterance of words to the effect, that, "had there been any other person in his place, he would have certainly committed suicide" is what makes the present case distinct from the aforementioned cases considering the facts and circumstances of the present case, we do not think it is a case which requires any interference by this court as regards the impugned judgment and order of the High Court. Coming to the case at hand, as we have stated earlier, the suicide note really does not state about any continuous conduct of harassment and, in any case, the facts and circumstances are quite different. In such a situation, we are disposed to think that the High Court is justified in quashing the proceeding, for it is an accepted position in law that where no prima facie case is made out against the accused, then the High Court is obliged in law to exercise the jurisdiction under Section 482 of the Code and quash the proceedings. V.P. Shrivastava v. Indian Explosives Limited and Others , (2010) 10 SCC 361

Before parting with the case, we are impelled to say something. Mr. Bhushan, learned counsel appearing for the respondent No. 1 & 2 has drawn our attention to a facet of earlier judgment of the High Court wherein it has been mentioned that at one time the deceased was pressurised by some superior officers. We have independently considered the material brought on record and arrived at our conclusion. But, regard being had to the suicide note and other concomitant facts that have been unfurled, we are compelled to recapitulate the saying that suicide reflects a "species of fear". It is a sense of defeat that corrodes the inner soul and destroys the will power and forces one to abandon one's own responsibility. To think of self-annihilation because of something which is disagreeable or intolerable or unbearable, especially in a situation where one is required to perform public duty, has to be regarded as a non-valiant attitude that is scared of the immediate calamity or self-perceived consequence. We may hasten to add that our submission has nothing to do when a case under Section 306 IPC is registered in aid of Section 113A of the Evidence Act, 1872. In the result, we do not perceive any merit in the appeal and the same stands dismissed accordingly.

*****

6. Sections 363, 366-A, 376/34 of IPC
Parhlad and Anr Vs. The State Of Haryana
Dipak Misra & Prafulla C. Pant, JJ.
IN THE SUPREME COURT OF INDIA.
Date of Judgment: 03-08-2015
Issue

Pleading consent can be granted for jurisdiction of carnal desire.

Relevant Extract

As the factual score would uncurtain, the case of the prosecution from the very beginning was that the prosecutrix was below sixteen years of age. The trial court believed the prosecution as regards the age of the prosecutrix as a consequence of which the plea of the defence had to collapse like a pack of cards which entailed conviction for the charged offences as per judgment dated March 10, 2003 which led to the sentence of rigorous imprisonment of ten years under Section 376(2)(g)IPC with separate sentence under Section 363 IPC with the stipulation that all the sentences shall be concurrent.

The judgment of conviction and order of sentence passed by the learned Additional Sessions Judge, Sirsa in Sessions Case No. 55 of 2002 were assailed before the High Court in Criminal Appeal No. 914 of 2003 and the learned Single Judge referred to the evidence of Manohar Lal, PW-1, Principal of the Govt. Primary School, Rupana Khurd, Dist. Sirsa, Bhajan Lal, PW-9, the father of the prosecutrix, Dr. Santosh Bishnoi, who had examined the accused and the prosecutrix and took note of the ossification test report, Ext. DA, and upon due appreciation of ocular and documentary evidence brought on record concurred with the view expressed by the trial court that the prosecutrix was below 16 years of age. Be it stated that the High Court did not think it appropriate to rely on the ossification test report as it found a number of flaws with it and opined that it was not worthy of credence. Additionally, the High Court has opined that the prosecutrix had no idea about the evil design of accused Parhlad, her uncle and she had proceeded with him in good faith and under compulsive circumstances she was raped by the accused persons and, therefore, there was really no consent. On the basis of the said analysis, it affirmed the judgment of conviction and order of sentence passed by the trial court. Hence, this appeal by special leave.

The core issues that arise for consideration in this appeal are whether the finding as regards the age of the prosecutrix is based on the proper

appreciation of evidence on record or it is so perverse that it deserves to be dislodged in exercise of jurisdiction under Article 136 of the Constitution, and further whether the opinion of the High Court relating to consent withstands scrutiny. On a perusal of the findings returned by the learned trial Judge as well as by the High Court, it is noticed that the learned trial Judge has relied upon the testimony of the prosecutrix, her father, and the school leaving certificate, which has been brought on record and tendered in evidence; and the High Court, on re- appreciation of the testimony of the prosecutrix and her father coupled with the testimony of PW-1, the Head Master of the concerned school has found that the version of the prosecution is truthful. As is perceptible, the prosecutrix has deposed that she was about 14 years of age at the time she went with her uncle and made a prey of the uncontrolled debased conduct of the appellants. The father of the prosecutrix has testified in a categorical manner about the factum of age of the prosecutrix. The Principal, PW-1, who has proved the school leaving certificate has stood embedded in his testimony and not paved the path of tergiversation despite the roving cross-examination. Nothing has been elicited to create on iota of doubt in his testimony. On the said premises, as we find, the conclusion has been arrived at that the prosecutrix was below 16 years of age.

Tested on the touchstone of aforesaid legal premises, we do not find any perversity of approach as regards the determination of age of the prosecutrix. The next facet relates to the facet of consent. It needs no special emphasis to state that once it is held that the prosecutrix is below 16 years of age consent is absolutely irrelevant and totally meaningless. However, as has been stated earlier the High Court has addressed itself with regard to the plea of consent advanced by the accused persons. The material brought on record clearly reveal that Parhlad, first cousin of the father of the prosecutrix in the absence of her parents at home had asked her to go with him for harvesting wheat crop to village Rupana Ganja and accordingly she had accompanied him to the residence of the appellant No. 2, who is the maternal uncle of Parhlad. The prosecutrix has deposed that she was in a totally helpless situation and despite her resistance she was sexually abused. The mental and physical condition of a young girl under the dominion of two grown up males who had become slaves of their prurient attitude can be well imagined. The consent, apart from legal impermissibility, cannot be conceived of. In this context reference to certain authorities would be appropriate.

Viewed on this prismatic reasoning, the conclusion arrived at by the High Court on the obtaining factual score cannot be faulted. Needless to say, it is an alternative submission pertaining to quantum of sentence. The learned

trial Judge has sentenced the appellants to suffer rigorous imprisonment for a term of 10 years each for the offence under section 376 (g) of IPC apart from other offences. Sentence in respect of the offence of rape has to be in consonance with the law. The concept of special reasons as engrafted in IPC prior to the amendment brought in force by Act 13 of 2013 with effect from 3.02.2013 is not to be invoked for the asking. We need not enumerate anything in that regard, for there is no justification or warrant for thinking of reduction of sentence in this case. The appellants, to say the least, had taken advantage of their social relationship with the prosecutrix. She had innocently trusted the first appellant and, in fact, there was no reason to harbour any kind of doubt. The devilish design of the appellant No. 1 and the crafty manipulation of the appellant No. 2 is manifest. It has to be borne in mind that an offence of rape is basically an assault on the human rights of a victim. It is an attack on her individuality. It creates an incurable dent in her right and free will and personal sovereignty over the physical frame. Everyone in any civilised society has to show respect for the other individual and no individual has any right to invade on physical frame of another in any manner. It is not only an offence but such an act creates a scar in the marrows of the mind of the victim. Anyone who indulges in a crime of such nature not only does he violate the penal provision of the IPC but also right of equality, right of individual identity and in the ultimate eventuality an important aspect of rule of law which is a constitutional commitment. The Constitution of India, an organic document, confers rights. It does not condescend or confer any allowance or grant. It recognises rights and the rights are strongly entrenched in the constitutional framework, its ethos and philosophy, subject to certain limitation. Dignity of every citizen flows from the fundamental precepts of the equality clause engrafted under Articles 14 and right to life under Article 21 of the Constitution, for they are the “fon juris” of our Constitution. The said rights are constitutionally secured. Therefore, regard being had to the gravity of the offence, reduction of sentence indicating any imaginary special reason would be an anathema to the very concept of rule of law. The perpetrators of the crime must realize that when they indulge in such an offence, the really create a concavity in the dignity and bodily integrity of an individual which is recognized, assured and affirmed by the very essence of Article 21 of the Constitution. Consequently, the appeal being, sans stratum, stands dismissed.

*****

7. Section 302 r/w Section 149, 324 r/w Section 149 and 148

Ramvilas Vs. State Of M.P.

T.S. Thakur, R. Banumathi ,JJ.

IN THE SUPREME COURT OF INDIA.

Date of Judgment: 18-08-2015

Issue

Correctness of the Judgment on murder to hurt and common object.

Relevant Extract

Case of the prosecution is that on 23.07.1991 at about 7.00 O'clock in the morning at village Hathighat, deceased-Bansilal had gone towards the riverside to attend nature's call. One Harisingh Kachhi (PW- 7), Jagdish (PW-13) and Noor Khan (PW-9) came to the house of Narmada Prasad (PW-3) and informed him that the accused-appellants were assaulting his brother-Bansilal. Narmada Prasad (PW-3) immediately rushed to the spot alongwith them and near 'otla' of Hardul Baba, he noticed that all the appellants armed with lethal weapons had surrounded his brother-Bansilal. Appellants Chhotelal, Kailash and Suresh were armed with spears, appellant- Ramvilas was armed with pistol, whereas appellants Ramsingh and Gorelal were carrying lathis with them. When Bansilal tried to escape, appellant- Ramvilas fired a shot from his pistol and when Bansilal fell down, appellants Chhotelal and Kailash attacked him with spear on his scalp and forehead. When Narmada Prasad (PW-3) tried to intervene, appellant-Kailash attacked Narmada Prasad with spear and caused injury below his right eye. Then Uma Bai (PW-5) sister of the deceased and Sona Bai-mother of the deceased tried to save Bansilal, the appellants Kailash and Ram Singh also attacked them. Appellant-Ramvilas intimidated and threatened the persons present there and said that if anybody would intervene, he would be shot dead. The appellants gave repeated blows to Bansilal by spear and lathis and then fled away. Injured Bansilal was immediately taken to the hospital where he was declared dead. On the complaint lodged by Narmada Prasad (PW- 3), brother of the deceased, FIR was registered in Criminal Case No.131 of 1991 under Sections 147,148, 149, 341 and 302 IPC at PS Nasirullahganj. After due investigation, the appellants were prosecuted under Sections 148, 302, 302 read with Section 149, 324, 324 read with Section 149,323 and 323 read with Section 149 IPC.

Upon consideration of the evidence, the trial court convicted the appellant-Ramvilas and other accused under Sections 302 read with Section 149, 324, 323 read with Section 149 and 148 IPC and sentenced them to undergo life imprisonment and further imposed sentence of imprisonment for other offences. On appeal, the High Court confirmed the conviction of the appellants and also the sentence of imprisonment imposed on each of them. These appeals assail the correctness of the impugned judgment. On application filed onbehalf of the appellants, the appeal was dismissed as withdrawn qua the appellants Suresh (A1), Kailash (A2) and Ram Singh (A4) by the Chamber Judge Order dated 18.02.2013.

Conviction of the appellant-Ramvilas and other accused is based mainly on the evidence adduced by six eye witnesses, namely, Narmada Prasad (PW3), Rekha Bai(PW-4), Uma Bai (PW-5), Hari Singh (PW-7), Noor Khan (PW-9) and Jagdish (PW-13) coupled with other corroborative evidence. All the eye witnesses have consistently spoken about the occurrence and the overt acts of the accused including the appellant-Ramvilas. Courts below have recorded the concurrent findings of fact observing that the testimony of eye witnesses is credible and trustworthy. Deceased-Bansilal had sustained as many as twenty six injuries. Evidence of eye witnesses is amply corroborated by medical evidence. By perusal of the records, no cogent reasons are forthcoming to disbelieve the testimony of the eye witnesses and we find no reason to interfere with the concurrent findings recorded by the courts accepting the evidence of eye witnesses as trustworthy.

The conviction of the appellant-Ramvilas is based on the evidence of injured witnesses which is amply corroborated by the evidence of eye witnesses and medical evidence. Conviction of the appellant is based on proper appreciation of evidence and courts below have recorded concurrent findings and the same is not liable to be interfered with in exercise of power under Article 136 of the Constitution of India. These appeals are dismissed.

*****

8. Article 226

K.K. GOHIL Vs. STATE OF GUJARAT AND OTHERS .

M.Y. Eqbal & Arun Mishra ,JJ.

IN THE SUPREME COURT OF INDIA.

Date of Judgment: 12-08-2015

Issue

***Letters Patent appeal*.**

Relevant Extract

The factual matrix of the case is that the appellant had joined the service on 16.11.1989 as a peon in the Social Welfare Department and, thereafter, the appellant was promoted as Junior Clerk in the pay-scale of Rs. 950-1500 vide order dated 30.6.1997 and posted under the Commissioner of Tribunal Development, Gujarat State and the said scale of Rs.950-1500 which came to be revised as Rs.3050-1590 in view of the Revision of Pay Rules, 1998 made effective from 1.1.1996. The appellant had completed nine years of service on 30.6.2006 and was granted the first higher grade scale of Rs.4000-6000 by the Competent Authority i.e. Commissioner of Tribunal Development, Gujarat State w.e.f. 1.7.2006 by order dated 22.6.2007, according to the policy of the Government of Higher Grade Scale introduced vide Government Resolution dated 16.8.1994. The appellant was meeting with all the requirements to get the higher grade scale as provided under the said scheme except passing of the departmental examination, which the appellant had not been able to clear because such examination was not conducted at all by the department and this fact was taken into consideration by the Departmental Promotion Committee and considering the policy of the Government in this regard, the first higher grade scale of Rs.4000-6000 was granted to the appellant.

The order of granting first higher grade scale to the appellant was not given effect to because of objection raised by the audit authorities and the matter was referred to the Government and the Government in Social Justice and Empowerment Department (Tribunal Development) had referred the matter to the General Administration Department. The authorities of the General Administration Department held that even if the department has not conducted the examination, it is the disqualification of the employee concerned to be eligible to get the higher grade scale and the specific

attention to the Judgment of the High Court was drawn to the officers of the General Administration Department and when they did not find any distinguishing features in both the cases, the stand was taken that the same cannot be made applicable to the appellant as he was not party to the said judgment. It has been pleaded on behalf of the appellant that the Commissioner of Tribal Development passed an order dated 26.8.2009 in view of the decision taken by the Government and cancelled the higher pay scale given to the appellant. Aggrieved by the said order of the Department, the appellant approached the High Court of Gujarat at Ahmedabad under Article 226 of the Constitution of India by filing SCA No.11767 of 2009. The learned Single Judge of the High Court vide order dated 16.11.2009 dismissed.

The above said petition Appellant then moved an appeal against the order of the learned Single Judge being LPA No.2392 of 2009. The Division Bench of the High Court upheld the decision of the Single Judge.

In the instant case, admittedly, the higher pay scale was ordered to be granted to the appellant after completion of nine years but the same was withdrawn on the basis of earlier circular of 1994. The High Court has not considered the subsequent circular of 2004 and based on the circular of 1994, the order withdrawing the benefit was upheld. The impugned order passed by the High Court on this account cannot be sustained in law.

Considering the entire facts of the case, vis-a-vis the Government Resolution time to time issued relating to the condition for giving benefit of promotion, we are of the view that the reasons assigned by the learned Single Judge and the Division Bench of the High Court cannot be sustained in law. Hence, this appeal is allowed and the impugned order passed by the High Court is set aside. Consequently, it is held that the appellant is entitled to the higher pay scale on completion of nine years of service.

*****

9. Articles 226 and 227 ,&
Cl. 9(1)(a), Cl. 9(2)(d), Cl. 11(2), Cl. 3.1 Medical Council of India Act ,1956.
Dr. Deepak Bansal Vs. State of Odisha and others.
INDRAJIT MAHANTY & DR. JUSTICE D. P. CHOUDHURY, JJ.
IN THE HIGH COURT OF ORISSA, CUTTACK
Date of Judgment: 19.08.2015
Issue

Remedy to issue an order of mandamus and effectivity of Cl. 9(1)(a), Cl. 9(2)(d), Cl. 11(2), Cl. 3.1 of Medical Council of India Act ,1956.

Relevant Extract

In 2012 Satyabrata Sahoo and others who appeared in the entrance examination in open category for the admission to P.G. Medical Course in the Government College, challenged clause 11.2 of the Prospectus for selection of candidates for P.G. Medical Course. In the High Court of Orissa Satyabrata Sahoo and others did not get favourable order, for which the matter went to the Apex Court. It is alleged inter alia that 72 in-service candidates and 111 direct candidates were selected through first round of counseling for admission to P.G. Medical Course which was scheduled to be commenced on 2.5.2012 for the academic session 2012-13. The petitioner has applied and got selected in the subject General Surgery for admission in M.K.C.G. Medical College, Berhampur. The Government of Odisha vide its order dated 30.4.2012 directed the District Medical Officer and Chief Medical Officer to relieve the Government Medical Officers to join in Medical Course to be commenced on 2.5.2012 vide Annexure-1. Accordingly the petitioner who was working as medical Officer, P.H.C. (New) Badkhilapadar under C.H.C. Kolnara was relieved and he being selected in the entrance test got him admitted to P.G. Course at M.K.C.G. Medical College, Berhampur on 2.5.2012. It is further averred that the Hon'ble Supreme Court vide its order dated 3.8.2012 decided the case filed by Satyabrata Sahoo and others vide Civil Appeal Nos.5705-5706 of 2012 directed the State of Odisha and other respondents to take urgent steps to rearrange the merit list and to fill up the seats of direct category excluding the in-service candidates to get admission in open category within one week therefrom. In compliance to the order the re-counseling was conducted and the petitioner got the same subject of General Surgery as direct candidate in general category in the same Medical College where he was studying, but formally he has to give his joining in compliance of the counseling dated 9.8.2012 and gave his joining letter on 10.8.2012 vide Annexure-3.For the Super Specialist post the petitioner became one candidate for admission of such course at S.C.B. Medical College, Cuttack for the academic year 2015-16.

When the merit list was prepared and the name of the petitioner was at sl. No.3 in the M.Ch. Course as direct candidate. Such merit list is annexed as Annexure-5. The criteria for selection of Super Specialist in Medical Course is completion of three years as a P.G. student by the time of admission into the Super Specialist Medical Course. It is the further case of the petitioner that the selection list (Annexure-5) was again revised on 23.6.2015 deleting the name of the petitioner vide Annexure-6. It is alleged inter alia by the petitioner that he has in fact joined the P.G. Course on 2.5.2015, but for re-scheduling the joining of P.G. Course by the opp. Parties the joining of the petitioner was re-scheduled formally as on 9.8.2012. Since the name of the petitioner was deleted vide Annexure-6, he had to approach the Hon'ble Supreme Court vide Writ Petition (Civil) No. 3571 of 2015 under Article 32 of the Constitution of India. The Hon'ble Apex Court asked the petitioner to challenge the matter of merit list in this Court. So he filed the present writ application challenging the arbitrary action by the opp. Parties by not considering the right to admission in the event of his selection. On the other hand, it is alleged by the petitioner that his fundamental right guaranteed under the Constitution has been violated and he was deprived in taking admission to Super Specialist Course although he was selected, for which he prayed to direct the opp. Parties to permit the petitioner to take admission in Super Specialist Course (M.Ch.) in the academic session 2015-16.

POINTS FOR CONSIDERATION

(i) Whether the petitioner has qualified to be direct candidate under the Super Specialist Course?

(ii) Whether the opp. Parties have violated the fundamental right of petitioner by deleting the name of the petitioner in the merit list dated 23.6.2015?

We have heard respective counsels on the issues.

Clause 3.1 defines direct candidates in the following manner:-

" 3.1. Direct Candidates:

Direct Candidate is one who at the time of application has passed qualifying examination and is not employed in any type of temporary or permanent jobs under Govt. of Odisha/Govt. of Odisha undertaking or if in service under the State Govt. or State Govt. Undertaking, have not completed 3 years of service by 31.7.2015."

Clause-3.2 also defines the in-service candidate in the following manner:-

" 3.2. In-Service Candidates:

In-service Candidate is one, who, at the time of application, is in the employment of Govt. of Odisha/Govt. of Odisha undertaking and either have completed 3 years of service or will complete three years by 31.7.2015 (excluding at a stretch leave of 30 days or more). The maternity leave will not be counted for this purpose. The employment includes all category of employment under Govt. of Odisha/ Govt. of Odisha undertaking like Adhoc/ Temporary/ Contractual and/ or Regular appointments. In-Service candidates are required to furnish the service certificate as per Appendix-III. The candidates under employment of Public Sector Undertaking should furnish service certificate along with certificate of sponsorship from the employer as per Appendix-III & IV of the prospectus. Candidates who are in service shall apply with intimation to their employer. The copy of such intimation letter is to be produced at the time of document verification. Candidates under employment in Public Sector undertakings are to furnish a "No objection" certificate from the employer in the enclosed proforma (vide Appendix-1)."

It is the contention of the petitioner that he has completed three years as a P.G. student by 31.7.2015 as per clause 6.1 of Annexure-4, whereas the learned Addl. Government Advocate and D.M.E.T. submitted that Annexure-5 has been issued wrongly inasmuch as the petitioner actually got admitted to P.G. Course on 9.8.2012 and has not qualified in terms of clause 6.1 of Annexure-4 as he has not completed three years P.G. Course by 31.7.2015. It is submitted by learned counsel for the M.C.I. that M.C.I. has recommended seven seats for M.Ch. direct candidates for their admission into such course during the academic session 2015-16. It is also admitted by the opp. Parties that 14 candidates as per Annexure-5 qualified to get admission subject to minimum qualification as per clause 6.1 of Annexure-4. When the name of the petitioner finds place in sl.no.3 of Annexure-5, no doubt he has qualified under clause 3.1, but it has to be seen whether he has qualified as per the criteria under clause 6.1 of the prospectus (Annexure-4).

The petitioner filed additional affidavit stating that he joined on 2.5.2012 and by virtue of the decision of Satyabrata Sahoo and others the list was re-arranged on 10.8.2012, for which he has completed three years effectively by 31.7.2015 for having minimum qualification under clause 6.1 of the prospectus to get admitted in M.Ch. course. He drew our attention to Annexure-7 which was issued by the Dean & Principal of M.K.C.G. Medical College which is placed below:-

CERTIFICATE

This is to certify that Dr. Deepak Bansal was admitted to P.G. course in M.S. (General Surgery) at this Medical College during 1st round counselling held on 23-04-2012 and joined the course on 02-05-2012 and continued till cancellation of the admissions in pursuance to Orders of the Hon'ble Supreme Court of India in Civil Appeal No.5705-5706 of 2012 arising out of SLP (C) No.16301/16202 of 2012 on 08-08-2012. The period spent from 2-5-2012 to 8-8-2012 has been regularized and treated as duty and allowed to draw pay and allowances duly deducting the stipend amounting Rs.91,654 (Rupees Ninety- One Thousand Six Hundred Fifty Four) only already paid vide Govt. Order No.28206/H., dated 01-11 2012 of the Govt. of Odisha, Health & F.W. Department. This certificate is being issued on his own request in connection with regularization of his services."

From the aforesaid certificate it appears that petitioner has got admitted in P.G. course in M.S. (General Surgery) in M.K.C.G. Medical College on 2.5.2012, but his admission was cancelled on 8.8.2012 because of the decision of Satyabrata Sahoo and others (supra). On the other hand the opp. Parties filed the records where proceeding of the meeting of Super Specialist Committee held on 20.6.2015 is available. Technical education, including Medical education requires infrastructure to cope with the requirement of the proper education to the students. Thus, technical institution be Government or non-Government should be very much cautious about the following the rules and regulations as well as the directive of the Hon'ble Apex Court strictly. In Satyabrata Sahoo and others (supra) their Lordships have categorically observed at paragraph-15 that clause 9(1)(a) of the M.C.A. Rules clearly stipulates that student for P.G. Medical course shall be selected strictly on the basis of inter se academic merit. Relying upon such ratio of the Hon'ble Apex Court, we are of the view that the petitioner since has been selected in the merit list and has admittedly entered to admission in P.G. course on 2.5.2012 and because of the misinterpretation of the judgment by the opp. Parties without any rhyme and reason, but for the reason best known to them, his continuance in P.G. course must be counted from 2.5.2012 for a period of three years which concludes on 2.5.2015. Since he has already completed three years P.G. Course by 31.7.2015 and he has qualified in the merit test as per clause 6.1 of Annexure-4, the proceeding dated 20.6.2015 of the meeting of Super Specialist Selection Committee is held to be not in consonance with the prospectus and same is liable to be struck down. Consequently Annexure-6, the rearrangement of the merit

list deleting the name of the petitioner being found against the Annexure-4 and contrary to the M.C.I., guidelines, same is illegal. On the other hand right to get admission into M.Ch. Medical Course which petitioner is entitled to get, has been violated by the opp. Parties by deleting his name from the merit list dated 23.6.2015. Thus his fundamental right as guaranteed under Articles 14, 19 and 21 of the Constitution of India has been violated. Issue No.II is answered accordingly.

CONCLUSION

In view of the aforesaid analysis we are of the view the petitioner has qualified to be direct candidate under Super Specialist Course and the opp. Parties have illegally deleted his name while publishing Annexure-6. Hence the proceeding of the meeting of the Super Specialist Committee dated 20.6.2015 as well as the merit list prepared on 23.6.2015 vide Annexure-6 are all quashed being dehors to Annexure-4 and the fundamental right of the petitioner guaranteed under the Constitution. We hereby direct the opp. Parties to give admission to the petitioner strictly as per the merit list prepared vide Annexure-5. All original documents filed by the State be returned to learned Addl. Government Advocate. Accordingly we allow the writ petition.

*****

10. Section 17- B Industrial Dispute Act
Sub-Divisional Officer, Telecom, Jaleswar Vs. Presiding Officer-Central Govt. Industrial Tribunal-cum- Labour Court & ors.
D.H. WAGHELA C.J. & BISWANATH RATH, J.
IN THE HIGH COURT OF ORISSA, CUTTACK
Date of Judgment: 04.08.2015
Issue

Compliance of payment u/s 17 B of Industrial Dispute Act, 1947.

Relevant Extract

The factual background as far as it is relevant for the present purpose is that the respondent-workman raised an industrial dispute which was decided by award dated 17.04.2012 in which it is recorded that the appellant herein did not file any reply or written statement despite sending notice through registered post and the Management did not turn up to defend the case due to which the Labour Court had to proceed ex parte. The appellant is, by the award, directed to reinstate the respondent on the post from which he was disengaged as a contract labour and pay him back wages from the date of his disengagement within a period of three months from the date of the award. That award has been challenged by the appellant herein in W.P.(C) No. 20504 of 2012 and the interim impugned order as aforesaid is made. Learned counsel for the appellant vehemently argued that, as observed by the Apex Court in *Anil Sood vs. Presiding Officer, Labour Court-I*, (2001)10 SCC 534, the interest of the Management must also be protected in a given case. He submitted that the respondent was not in the employment of the appellant at all and hence no backwages could be calculated on the basis of the salary last drawn by him. As against that, learned counsel for the respondent submitted that the respondent was in the regular employment of the appellant and was drawing minimum wages and in any case entitled to withdraw the minimum wages applicable to the respondent. Even as the rate of wages or daily wage is no where mentioned in the impugned award or the record of the case, it is submitted that as the erstwhile semi-skilled employee of the appellant, the respondent was entitled to draw the minimum wages. In spite of repeated query, learned counsel for the appellant has refused to divulge any information about the actual salary or daily wages drawn by the respondent-workman at or around the time of his disengagement from service. Instead, it was submitted that the appellant was prepared to deposit such lump sum amount in the Court as may be directed, pending adjudication of the main petition. That however, completely defeats the very purpose of Section 17-B of the I.D.Act, even as the workman is expected to face one after the other

litigation, even after an award in his favour. His service appears to have been terminated by the end of November, 2010 and the appellants have neither reinstated him despite the award nor paid any wages by way of backwages. It was also argued that the wages to be paid as per the provisions of Section 17-B of the I.D.Act ought to be counted from the date of the order of the Court whereas the interim direction of the Court in the impugned order is to pay the current wages from the date of the award.

Having regard to the facts and circumstances and recent judgment of the Apex Court, the impugned order directing to comply with the provisions of Section 17-B could not be found fault with. The direction in the impugned order reiterating the direction by order dated 25.4.2013 to comply with the provisions of Section 17-B of the I.D.Act from the date of the award i.e. 17.4.2012 appears to be legal and correct. Since the appeals are directed against making any payment and without complying with the orders of this Court, both the appeals are dismissed with cost quantified at Rs.2500/- which the appellant shall pay to the respondent along with arrears of benefits in terms of Section 17-B within a period of fifteen days from today. In absence of any assistance or instruction in that regard from the respondent, the appellant is directed to calculate the amount of benefits @ Rs.180/- per day which is stated to be the minimum wages prevalent at the relevant time for the semi-skilled laborer.

*****

11. Section 26 (2)
Suresh Chandra Mishra Vs. State of Odisha and others.
INDRAJIT MAHANTY & DR. JUSTICE D.P.CHOUDHURY ,JJ.
IN THE HIGH COURT OF ORISSA, CUTTACK
Date of Judgment: 03.08.2015
Issue

Legality of shop temporarily and return of the consideration money.

Relevant Extract

The admitted facts in the present case are that the petitioner has been a licensee for Arisol C.S. shop since 2005 and his license was renewed from time to time at the self-same location till 17.5.2010 where the Collector, Puri, apprehending law and order problem in that area, directed temporary closure and thereafter, since the law and order situation continued due to agitation and the "Rasta Roka" etc. by the local residents, by Order dated 9.6.2010 under Annexure-2 directed that the C.S. Shop is hereby closed from the said date, under Section 26(2) of the Bihar & Odisha Excise Act until further orders. This order remained in force till 27.8.2010 under Annexure-3 wherein the proposal for shifting of the petitioner's shop to a location at Mangalpur was rejected and the petitioner was directed to locate another unobjectionable site at Delanga Block area. Thereafter, the petitioner took steps to locate an unobjectionable site in Delang Block and the said site was duly approved by the Excise Commissioner, Odisha under cover of letter dated 28.3.2011 and communicated to the licensee by Collector, Puri vide letter dated 30.3.2011. Thereafter, the petitioner re-started his operation at the re-located site i.e. at Manatina w.e.f. 31.3.2011. Mr.Bhuyan, learned Addl. Govt. Advocate for the State fairly submits that on the factual aspects of this case, there appears to be no dispute. However, he places reliance on the averment made in Para-9 of the counter affidavit, the same is quoted herein below:

"Once a shop is settled in favour of an individual, it becomes the responsibility of the licensee in entirety to see that the shop is opened and consequently, he submits that the petitioner is liable under the contract

entered into with the State for both the consideration money as well as the MGQ for the period even if the shop remains closed."

For adjudicating the aforesaid issue, Section 26(2) of the B & O Excise Act, 1915 is hereby extracted:

"**Section 26 - Power to close shops temporarily**

(2) If any riot or unlawful assembly is apprehended or occurs in the vicinity of any shop in which any [Substituted by A.L.O. 1937.] [intoxicant] is sold, any Magistrate or any police officer above the rank of constable, who is present, may require such shop to be kept closed for such period as he may think necessary."

On a plain reading of the aforesaid provision of law, it is clear that authorities of the State have the power to close the shop temporarily and the licensee is bound statutorily to abide by such directions. In the present case and the facts situation narrated hereinabove, it is clear therefrom that the Collector, Puri, in exercise of power under Section 26(2) of B & O Act, 1915 directed temporary closure of the shop until further orders. Such order continued to remain in operation from 9.6.2010 till 30.3.2011. Therefore, it cannot be contended or argued that the petitioner, on his own volition, ceased operation of the shop. On the contrary, it is clear that the petitioner was duty bound to effect closure of the shop though temporarily for the duration during which, direction under Section 26(2) of the B & O Act remained in operation.

Another important fact is to be noted hereunder is that the petitioner was operating his C.S. license at Arisol since 2005 right till the date of temporary closure i.e. 09.06.2010. It is admitted by the learned counsel for the State that the site where
he was operating his C.S. shop was not an unobjectionable site as contemplated under the B & O Act. In other words, it is the admitted fact that the site, where the petitioner was operating his shop originally for over a period of six years, was an unobjectionable site. However, due to public agitation by the local residents, the District Administration sought to exercise its authority under Section 26(2) of the B & O Act and directed temporary closure and also directed the petitioner to re-locate the
shop room. Such re-location has taken place w.e.f. 31.3.2011. It is also a statutory duty for the licensee to abide by the administrations' direction in the

larger public interest. But, in the fact situation of the present case, it cannot be stated that the petitioner's original shop has been located at an objectionable site and the petitioner had to lawfully comply with the direction issued under Section 26(2) of the B & O Act. Therefore, we are of the clear view that the Judgment rendered by the Division Bench of this Court in the case of *Krushna Chandra Sahu* (supra), equity in the present case, lies in favour of the petitioner and against the State.

As a consequence of the aforesaid finding, we are of the clear and categoric view that there has been no omission on the part of the petitioner to comply with the direction of the State authority and on the contrary, while complying with the direction
of the State authority, insofar as temporary closure is concerned, no penal action nor penalty or claim for consideration money/MGQ can be levied on the petitioner though he may be a licensee under the State Excise Act.

Accordingly, we direct Opposite Parties 1 and 3 to effect refund or adjust the amount deposited by the petitioner as detailed under Annexure-4 against any future dues of the petitioner who it is stated to be continuing his excise license under the State. With the aforesaid observation and direction, the writ application is allowed.

*****